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Conference

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 ALEXANDER INTERACTIVE, INC.,  
4 ET AL,

Plaintiffs,

5 v.

12 CV 6608 (PKC)

6 ADORAMA, ET AL,

7 Defendants.

8 -----x

9 New York, N.Y.

May 23, 2013

10 2:45 p.m.

11 Before:

12 HON. P. KEVIN CASTEL,

13 District Judge

14 APPEARANCES

15 SAVAGE & ASSOCIATES

Attorneys for Plaintiffs

16 BY: DENISE L. SAVAGE

17 REISS EISENPRESS & SHEPPE

Attorneys for Defendants

18 BY: DANIEL J. BROWN

19 NORWICK SCHAD & GOERING

Attorneys for Plaintiffs as Counterclaim Defendants

20 BY: KENNETH P. NORWICK

21 KELLOGG HUBER HANSEN TODD EVANS & FIGEL

Attorneys for Nonparty Samsung Electronics America

22 BY: MICHAEL N. MULVANIA

23 HOLLAND & KNIGHT

Attorneys for Nonparty Magento, Inc.

24 BY: PATRICK J. SWEENEY

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1 (In open court)

2 THE DEPUTY CLERK: Alexander Interactive, Inc. v.  
3 Adorama, Inc. et al.

4 Plaintiff ready?

5 MS. SAVAGE: Yes. But first I'd like to defer to  
6 Mr. Mulvania. He needs to --

7 THE DEPUTY CLERK: Just state your appearance.

8 MS. SAVAGE: Oh, I'm sorry.

9 Savage & Associates, Denise Savage, on behalf of the  
10 plaintiffs.

11 MR. NORWICK: Kenneth P. Norwick, Norwick, Schad &  
12 Goering. And I'm here for the plaintiffs as counterclaim  
13 defendants.

14 THE COURT: All right.

15 MR. BROWN: Daniel J. Brown for defendants from Reiss  
16 Sheppe, LLP.

17 Good afternoon, your Honor.

18 THE COURT: Afternoon.

19 MR. MULVANIA: Your Honor, Mike Mulvania for nonparty  
20 Samsung Electronics America.

21 THE COURT: All right.

22 MR. SWEENEY: Your Honor, Patrick Sweeney from Holland  
23 & Knight for nonparty Magento, Inc.

24 I was advised by plaintiff's counsel that I should  
25 show up today because she is going to argue issues regarding

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1 some discovery we're involved with in the Northern District of  
2 California.

3 THE COURT: Let's see where we go with this.

4 First of all, the record will reflect that of my  
5 pending caseload, I don't think there presently is any case  
6 that generates more paper or correspondence or disputes than  
7 this case. And maybe today I'll find out why that is so  
8 necessary.

9 But let me hear from the plaintiff first with regard  
10 to the outstanding discovery against nonparty Samsung, and then  
11 we'll see where we go after that issue is resolved.

12 MS. SAVAGE: Thank you, your Honor.

13 While we were waiting for your Honor, I had  
14 conversations with Adorama's counsel, the defendant's counsel,  
15 and Samsung's counsel to see if we could resolve some of the  
16 outstanding issues. Both Samsung and Adorama had indicated  
17 that they believe they can provide and will provide sales and  
18 inventory information. I don't want to mischaracterize what  
19 you represented to me earlier; is that accurate?

20 MR. MULVANIA: I believe we have inventory data. I  
21 can't represent for sure that we have it, but I'm pretty  
22 confident that we do.

23 THE COURT: What kind of data, sir?

24 MR. MULVANIA: It would be data reflecting sales of  
25 Samsung products to Adorama.

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1 THE COURT: All right. During what time period?

2 MR. MULVANIA: I believe it's during any relevant time  
3 period.

4 THE COURT: Okay. That's fine. All right.

5 MS. SAVAGE: And the only other issue is that we are  
6 looking for correspondence by and among any employees of  
7 Samsung and employees of Adorama surrounding a so-called  
8 Samsung demo that took place, where we believe it was at  
9 Adorama's premises one day, and perhaps at Samsung's another.  
10 The time period would have been between probably October 2011  
11 and February and March of 2012. And I believe that defendant's  
12 counsel has now indicated that Adorama will indeed look for  
13 this correspondence to see if any such correspondence exists.

14 What I have said is that in the event they are  
15 unsuccessful in finding any correspondence in the defendant's  
16 records, what I would like is information regarding what  
17 Samsung executives or persons attended these meetings, and I  
18 can supply them to Samsung's counsel, that information, and  
19 then Samsung could look into its databases to see if it can  
20 find any correspondence by and among those employees and  
21 Adorama's employees.

22 I don't recall what Mr. Mulvania's response was to  
23 that request.

24 Can you address the Court on that?

25 MR. MULVANIA: Your Honor, the first we've learned

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1 that we need any specific stuff was in the plaintiffs' letter,  
2 I believe, from Tuesday. The subpoena was issued, I believe,  
3 some time in December or January. We believe it just has been  
4 incredibly overbroad. I think one request said --

5 THE COURT: It was; I've read it. It was incredibly  
6 overbroad. Not only was it incredibly overbroad, this district  
7 has uniform definitions and discovery requests. They were  
8 ignored and violated. Uniform definitions and discovery  
9 requests have been part of the local rules of this Court for  
10 something in the neighborhood of 25 years; and it was as if  
11 they didn't exist.

12 MS. SAVAGE: Well, your Honor, I have to say that I've  
13 used those definitions in discovery for the past 25 years or  
14 so -- well, with the exception of references to metadata or  
15 other terms that are of more recent origin -- in the bankruptcy  
16 court, in this Court, in other district courts around this  
17 country. And while I understand they are uniform, I didn't  
18 understand that it was mandated that the definition couldn't be  
19 expanded if it was disclosed to the other side what the  
20 definitions entailed.

21 THE COURT: So, in other words, if you don't like the  
22 definition of "documents," you can supply your own definition  
23 of documents.

24 MS. SAVAGE: Well, no, not necessarily. But I may  
25 want to indicate, for example, that there are specific

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1 documents that we might need, but I might want to even narrow  
2 the definition.

3 THE COURT: No, you put in your own definition. Take  
4 a look at your subpoena. That's what you did. You replaced  
5 it.

6 Now, I'm going to punch up -- as soon as I can get my  
7 computer booted up -- a copy of the local rules, and we'll find  
8 out.

9 MS. SAVAGE: At the same time, in correspondence with  
10 Samsung when they responded --

11 THE COURT: Excuse me a second.

12 MS. SAVAGE: May I, your Honor?

13 THE COURT: No.

14 MS. SAVAGE: Or would you like me to wait?

15 THE COURT: Please wait, Ms. Savage.

16 (Pause)

17 THE COURT: Well, let's just see.

18 Local Civil Rule 26.3(a):

19 "The full text of the definitions and rules of  
20 construction set forth in Paragraphs C and D is deemed  
21 incorporated by reference into all discovery requests."

22 MS. SAVAGE: Okay. So it's deemed incorporated. So  
23 if I expanded on them, then those definitions are nonetheless  
24 deemed incorporated.

25 THE COURT: Ms. Savage, if you had waited, instead of

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1 interjecting, you would have learned the next sentence.

2 MS. SAVAGE: Okay.

3 THE COURT: "No discovery request shall use broader  
4 definitions or rules of construction than those set forth in  
5 Paragraphs C and D."

6 MS. SAVAGE: Okay.

7 THE COURT: Now, do you want to correct your statement  
8 now?

9 MS. SAVAGE: I will correct my statement.

10 THE COURT: All right.

11 So when you interject to challenge the Court on a  
12 point, you might be well-advised to wait until the Court  
13 finishes reading the rule.

14 And it goes on to say: "This rule shall not preclude  
15 the definition of other terms specific to the particular  
16 litigation, the use of abbreviations, or a more narrow  
17 definition of a term defined in Paragraph C."

18 It does not, however, permit a broader definition.  
19 That was violated in your definitions. And as you stood here  
20 today, you were apparently unaware of the content of the rule.

21 MS. SAVAGE: What I can say, your Honor, is that  
22 ultimately the request to Samsung was extremely narrowed via  
23 correspondence among the parties. And while I appreciate that  
24 it might have initially been too broad, it wasn't -- they were  
25 not definitions that I stood upon; they are not definitions I

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1 attempted to enforce in broad scale.

2 And if you look at the email exchange between  
3 Samsung's representative and myself in going through April and  
4 into -- I think it was into May or it might have been into  
5 April, you will see that I narrowed and very explicitly set  
6 forth the documents that we were seeking. Thus --

7 THE COURT: That may be well and good, but the reality  
8 is that the rule provides, as it does for good reason -- I know  
9 this because while in private practice, I was one of the  
10 principal draftpersons of the rule. And it may well be that  
11 the rule requires an amendment. And I urge you, if you're of  
12 the view that it requires an amendment, to so apply to the  
13 Court. But until such time as that occurs, I would insist that  
14 you comply with the local rule, Ms. Savage.

15 MS. SAVAGE: I absolutely will, your Honor.

16 THE COURT: In this and every other case.

17 MS. SAVAGE: I agree. And I absolutely will.

18 THE COURT: All right.

19 MS. SAVAGE: Thank you, your Honor.

20 I don't think we actually resolved the issue of  
21 whether, in lieu of obtaining any correspondence from the  
22 defendant by and among employees at Adorama, employees at  
23 Samsung -- I could provide names of the employees at Samsung  
24 who met with Adorama representatives to see if Samsung could  
25 find any correspondence.



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1           One of the issues that Mr. Mulvania said to me is that  
2 they had these meetings all the time, and Samsung isn't certain  
3 who necessarily met with the Adorama representatives.  
4 Therefore, so as not to burden Samsung, and now that Adorama  
5 has indicated they will at least look for such  
6 correspondence -- if they think it still exists, they are not  
7 sure -- in the event I don't get anything, the documents from  
8 the defendant, at least I can then narrow and provide the  
9 information that will narrow the search for Samsung.

10           THE COURT: Well, I've heard several things from you  
11 now. One was it was in lieu of getting the documents from  
12 Adorama, and the other was you were going to seek the documents  
13 from Adorama; but if you were unsuccessful in that quest, you  
14 would then turn to Samsung. Which is it?

15           MS. SAVAGE: I shouldn't have said "in lieu." I  
16 should have said in the absence of getting them initially,  
17 first, from Adorama, in the event they can't find any  
18 documents, I can get the names of -- at a minimum, of the  
19 Samsung representatives from Adorama, then ask Mr. Mulvania to  
20 see if Samsung is then able to ascertain whether those Samsung  
21 representatives have any correspondence.

22           THE COURT: You may do that, but I'm not giving you a  
23 blank check. Let's find out what happens, and then we'll hear  
24 from Samsung as to what is involved in such a search, depending  
25 on the specificity of the information you are able to obtain

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1 from Adorama.

2 MS. SAVAGE: Okay.

3 THE COURT: That's my ruling.

4 MS. SAVAGE: Okay. Thank you, your Honor.

5 So once I guess -- assuming Adorama is unable to find  
6 any such documents, but can provide me with names of the  
7 Samsung representatives, should I write -- I should just submit  
8 another letter to the Court asking for another discovery  
9 conference?

10 THE COURT: Absolutely not. Absolutely not. You  
11 should confer with Samsung's counsel in an effort to resolve  
12 it.

13 MS. SAVAGE: Okay.

14 THE COURT: Not write to the Court and advise that  
15 Adorama was unable to locate documents and you've obtained  
16 names from them. Do not write to the Court so advising.

17 MS. SAVAGE: Okay. I believe that that resolves the  
18 Samsung issue.

19 THE COURT: Thank you.

20 MS. SAVAGE: Would you like to move on to -- what  
21 would you like to move on to next, your Honor?

22 THE COURT: I'll let you know.

23 Mr. Mulvania, would you care to be excused at this  
24 point?

25 MR. MULVANIA: Yes, your Honor.

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1 Your ruling is very agreeable to Samsung.

2 THE COURT: Okay. Thank you.

3 MR. MULVANIA: Thanks, your Honor.

4 THE COURT: All right.

5 Now, let me inquire, with regard to Magento, let's get  
6 into the procedure here.

7 There is a subpoena that was issued out of which  
8 court, Northern District of California?

9 MS. SAVAGE: There was a document subpoena and  
10 deposition subpoenas issued out of this Court initially.

11 EBay is the 100 percent owner of Magento, Inc. EBay  
12 has an office here in New York City in Chelsea. And my office  
13 served both the *subpoena duces tecum* and the deposition  
14 subpoenas on eBay's New York State registered agent. And it  
15 was served on Magento, care of eBay, eBay's registered agent.

16 EBay California, in-house counsel responded on behalf  
17 of Magento. They actually produced 66,000 documents responsive  
18 to the subpoena; we worked with their in-house counsel. And we  
19 adjourned the depositions because there was a delay in being  
20 able to get all the documents together.

21 After that, we were contacted -- actually, eBay's  
22 in-house counsel then raised objections to the subpoenas being  
23 issued out of this Court, arguing that they should have been  
24 issued out of the court in northern California, because that's  
25 where Magento is.

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1 My position, I argued on behalf of the plaintiffs, was  
2 you're a global corporation; you have a location here in New  
3 York City, you have a registered agent --

4 THE COURT: Magento is a global corporation?

5 MS. SAVAGE: EBay is a global corporation.

6 THE COURT: Let's assume eBay is present in all 50  
7 states, all territories, and in all countries recognized by the  
8 United Nations. Of what significance is that relative to  
9 Magento?

10 MS. SAVAGE: Well, Magento is a 100 percent  
11 wholly-owned subsidiary --

12 THE COURT: Correct.

13 MS. SAVAGE: -- of eBay. And eBay's in-house counsel  
14 was the representative and was the responsive entity with  
15 respect to the subpoena, all the documents. It represented  
16 Magento at its depositions in California. Magento doesn't have  
17 in-house counsel.

18 THE COURT: Is the general counsel a person?

19 MS. SAVAGE: Yes.

20 THE COURT: Then they are not an entity.

21 MS. SAVAGE: I'm sorry, you lost me on that one, your  
22 Honor.

23 THE COURT: Well, you said they were the responsive  
24 entity; the general counsel was the general entity.

25 MS. SAVAGE: EBay's in-house counsel -- eBay was the

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1 responsive entity by and through its in-house counsel on behalf  
2 of Magento, Inc.

3 THE COURT: Now, did you try this argument on the  
4 judge out in California?

5 MS. SAVAGE: No, because the miscellaneous proceeding  
6 was started by the defendants out there, and so we just  
7 utilized the jurisdiction. And, in fact, he was wondering --  
8 he made us prove that he had jurisdiction over this matter,  
9 because the matter was pending here in New York. So we  
10 actually had to make a jurisdictional argument in northern  
11 California to demonstrate that he could rule.

12 THE COURT: Right. And Magento has its principal  
13 place of business in California; is that correct?

14 MS. SAVAGE: From what I understand.

15 THE COURT: And you served Magento in -- is this the  
16 Northern District of California?

17 MS. SAVAGE: Yes. I also served them via the Northern  
18 District of California after they raised these objections; but  
19 at the same time, I had still had served them with subpoenas  
20 out of this Court, as well.

21 THE COURT: Is Magento present in this district?

22 MS. SAVAGE: It is via as a wholly-owned subsidiary of  
23 eBay. And they performed work in this district for -- they had  
24 their employees come to this district and perform work for my  
25 client here in New York City. So they are present.

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1 THE COURT: There is long-arm jurisdiction under Rule  
2 45, but it extends to the 100-mile bulge. That's the extent of  
3 long-arm jurisdiction under Rule 45.

4 If you're dealing with a nonparty witness, you cannot  
5 bootstrap New York's long-arm statute to conduct discovery  
6 against someone who admittedly transacted business in the State  
7 of New York. You could sue that person in the State of New  
8 York perhaps, but Rule 45's scope does not extend on the  
9 long-arm basis.

10 MS. SAVAGE: Well, if we're going to go with that  
11 argument --

12 THE COURT: It's not an argument. It's a principle of  
13 law. Do you have any support for a contrary proposition,  
14 Ms. Savage?

15 MS. SAVAGE: I don't know that we even have to get  
16 into that, and I'll tell you why, your Honor. We want to  
17 obtain jurisdiction over an employee named Vitaliy Korotum. He  
18 doesn't work out of the Magento office in California; he works  
19 in the Ukraine.

20 Now, I --

21 THE COURT: You say you want to obtain jurisdiction  
22 over them. You want to name him as a defendant, is that --

23 MS. SAVAGE: No, I want to be able to subpoena him --

24 THE COURT: All right.

25 MS. SAVAGE: -- to depose him.

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1 And I served the subpoena for him in California out of  
2 this Court and also out of the court in California.

3 THE COURT: All right.

4 Have you employed the Hague Convention?

5 MS. SAVAGE: Well, what happened was when we were in  
6 California and we were -- we spoke with eBay's in-house counsel  
7 who was present at the depositions in California and  
8 represented Magento's people who were deposed, we were told --  
9 and I actually think one of the witnesses testified about this,  
10 as well -- that Mr. Korotum is a resident of the Ukraine, but  
11 he is often in this country working either at Magento's  
12 premises or working at locations all around the country because  
13 he does coding, source coding.

14 THE COURT: Well, that's good for you. That's very  
15 good for you, because you should be able to serve him with a  
16 Rule 45 subpoena when he's next in some American jurisdiction.

17 MS. SAVAGE: Correct.

18 THE COURT: And I recommend you do that.

19 MS. SAVAGE: And so to that end, I had asked eBay's  
20 in-house counsel to advise me of Mr. Korotum's schedule over  
21 the next couple of months so that we would know when he was in  
22 this country so that we would be able to serve him. And  
23 Magento has refused to provide that information to us to  
24 facilitate our ability to serve Mr. Korotum.

25 THE COURT: All right.

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1           So what did the judge in the Northern District of  
2 California have to say when you brought this to his attention?

3           MS. SAVAGE: That issue has not yet been raised with  
4 the judge in the Northern District of California.

5           THE COURT: All right. Well, then I assume it will.

6           MS. SAVAGE: So your Honor does not -- even though  
7 there is a subpoena for Mr. Korotum that was issued initially  
8 out of also this jurisdiction, your position is it's not in the  
9 100-mile radius. He could be in the -- I don't even know where  
10 he is; he could be in the 100-mile radius right now.

11          THE COURT: I don't have positions, because I'm not a  
12 party to this case.

13          MS. SAVAGE: Or I should say your ruling.

14          THE COURT: Well, I'm inviting you to argue your  
15 position. I know what Rule 45 says. And I'd be happy to be  
16 acquainted with any facts or law you wish to present me with  
17 for the proposition that I have the authority to enforce a  
18 subpoena against this individual. I gather you have not served  
19 him with a subpoena out of this Court; is that correct?

20          MS. SAVAGE: We had served it at Magento's offices,  
21 unaware that he was not at that location at the time.

22          THE COURT: But you didn't serve him.

23          MS. SAVAGE: No, because we have not been able to  
24 ascertain where he is.

25          THE COURT: And that subpoena at Magento's offices was



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1 issued out of the Northern District of California, right?

2 MS. SAVAGE: And one was issued out of here, as well.

3 THE COURT: For Mr. -- what's his name again?

4 MS. SAVAGE: Korotum.

5 THE COURT: Korotum.

6 So there was a subpoena issued out of the Southern  
7 District of New York to Mr. Korotum, and where was that served?

8 MS. SAVAGE: Magento, his office in California.

9 THE COURT: How would that be effective under Rule 45?

10 MS. SAVAGE: We did not know that he was not at the  
11 premises at the time.

12 THE COURT: So there's no subpoena before me which I  
13 could enforce if I wanted to.

14 MS. SAVAGE: Well, there is a production request to  
15 Magento directly in which we have asked to obtain information  
16 as to when Mr. Korotum will be in this country again so we are  
17 able to serve him.

18 THE COURT: All right. And you've made that request  
19 to Magento where you have a subpoena, which you have served on  
20 them out of the Northern District of California. And what has  
21 transpired?

22 MS. SAVAGE: Magento's in-house counsel said he would  
23 take it under advisement. This was during the depositions that  
24 were going on in California. A letter from Mr. Sweeney on  
25 behalf of Magento advised us that they would not disclose

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1 Mr. Korotum's schedule.

2 THE COURT: Okay. All right.

3 What's before me to decide?

4 MS. SAVAGE: Well, there are a number of things  
5 relating to Magento.

6 While the Court did not enter a letter or memo,  
7 endorse a letter directing Magento to be here, I asked if  
8 Magento would appear so that we could use this status  
9 conference to address all the outstanding discovery issues so  
10 we didn't have to send more paper to your Honor and we could  
11 engage in some kind of judicial economy in approaching all the  
12 discovery issues in this case.

13 So I can list to you all the Magento issues that are  
14 outstanding, or we can put everything to you in writing and  
15 appear before your Honor at another time.

16 THE COURT: Well, what I'm trying to get to,  
17 Ms. Savage, is whether I am the right judge for you to be  
18 directing your disputes with Magento to. That's the threshold  
19 question.

20 MS. SAVAGE: Well, and here's my response to this: We  
21 served a *subpoena duces tecum* out of this Court. We have not  
22 served a *subpoena duces tecum* out of the Northern District; it  
23 was served out of this Court on January 6th of 2013. It was  
24 served on eBay's registered agent here in New York, and  
25 ultimately it was sent to eBay's counsel in California.

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1 EBay's counsel in California contacted me representing  
2 that eBay was contacting me on behalf of Magento, a  
3 wholly-owned subsidiary. To that end, Magento's counsel then  
4 responded, sent 66,000 documents, and a very lengthy privilege  
5 log. They never raised jurisdictional objections within the  
6 14-day period under Rule 45. And, thus, it's my argument they  
7 waived it.

8 THE COURT: All right. Do you have support for that  
9 proposition? Because it seems to me that an alternative way of  
10 looking at this is if I get an invalid subpoena issued out of  
11 the wrong district, I might say reasonably and appropriately I  
12 haven't been served, the subpoena is not valid; but I believe  
13 this person could issue a valid subpoena to me, an enforceable  
14 subpoena. And why do I want to go through all that bother?  
15 Let me gather documents and produce them to the other side.  
16 That would be, it seems to me, a most reasonable way to  
17 proceed, wouldn't it?

18 MS. SAVAGE: It would. And I guess if I were that  
19 attorney, I would have responded saying I believe that you have  
20 issues in terms of obtaining jurisdiction over my client;  
21 however, because it's just a matter of you serving the subpoena  
22 out of the Northern District, we are prepared to produce these  
23 documents without waiving any jurisdictional arguments or  
24 rights. But that wasn't done.

25 THE COURT: All right.

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1 Well, let's hear from Magento. Are you before me or  
2 are you not before me?

3 MR. SWEENEY: Your Honor, respectfully, we are not  
4 before you. I am just here to -- as I said in my letter, to  
5 make sure that we are not prejudiced by any discussions that  
6 would go on with counsel and the Court, and to object to any  
7 efforts to enforce these facially-invalid subpoenas.

8 THE COURT: The argument that has been asserted is  
9 that there was purported service on Magento of a subpoena  
10 issued out of this Court which Magento had actual knowledge of  
11 and which Magento did not object. And by not objecting within  
12 the 14-day period set forth in 45(c)(2)(B), it waived any  
13 objection and, therefore, this Court acquired good jurisdiction  
14 to serve to -- to consider relief against Magento.

15 What say you?

16 MR. SWEENEY: I will respond in two ways:

17 First of all, if it's a facially-invalid subpoena,  
18 then it's of no force and effect from the beginning, so there's  
19 no need to object.

20 Secondly, I would say that almost immediately we  
21 engaged in good-faith discussions about responding to the  
22 subpoena and possible objections. And I believe under the  
23 *Conquered Boat* line of cases, that means that we can go beyond  
24 the 14 days if, in fact, we did miss the 14 days. I can't say  
25 that to be the case, but if we did, I think we're safe under

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1     *Conquered Boat.*

2             THE COURT: Well, why do you say a facially-invalid  
3 subpoena as opposed to a subpoena which you might assert was  
4 improperly served? Could not a party issue a subpoena out of  
5 this district and consent to service in this district, or  
6 consent to this Court's jurisdiction?

7             MR. SWEENEY: Under Rule 45, if the witnesses and  
8 documents are in a different district, then it's  
9 facially-invalid.

10            Could they consent? I think it's more along the lines  
11 of what your Honor was discussing earlier. We are the nonparty  
12 good-faith participant in these proceedings here. We actually  
13 wanted to proceed in good faith and minimize costs; but what we  
14 got instead was multiplication of costs by counsel's repeated  
15 efforts to overreach and drag us into this Court, when, in  
16 fact, there were discussions point-blank about if there were  
17 going to be issues with these subpoenas, then it should be  
18 taken up in the Northern District.

19            Ten days later, counsel filed her first letter  
20 requesting that we appear before your Honor. She subsequently  
21 withdrew that, but the timing is disturbing to us to say the  
22 least.

23            So there was no consent. Consent being any kind of  
24 willful waiver of a right, absolutely not.

25            THE COURT: All right. Let me hear from Ms. Savage.

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1 MS. SAVAGE: Your Honor, there was clearly consent,  
2 because the subpoena was sent back on January 6th of 2013.  
3 Magento never -- the *subpoena duces tecum*.

4 Magento never, ever -- eBay on behalf of Magento, I  
5 should say, never ever asserted any jurisdictional issues, any  
6 improper service; it never asserted that it didn't represent  
7 Magento, that service had been improper by utilizing the New  
8 York State registered agent. None of that ever came up. There  
9 is nothing in writing regarding that, nor was there anything  
10 verbally. There was never a motion made to quash the subpoena,  
11 for a protective order; there was literally nothing that  
12 demonstrates any question made by eBay of the propriety of  
13 serving that *subpoena duces tecum* out of this district. And  
14 ultimately, eBay produced 66,000 documents on behalf of  
15 Magento, and a privilege log. And it was only when we started  
16 to schedule the depositions in California which took place --

17 MR. BROWN: The last week of April and beginning of  
18 May.

19 MS. SAVAGE: -- the last week of April and the  
20 beginning of May. And we started scheduling those at the  
21 beginning of April, I believe, long past any time to start  
22 objecting to any service or jurisdictional or propriety issues  
23 relating to the *subpoena duces tecum* served on January 6th,  
24 that all of a sudden issues are raised as to the propriety of  
25 service of the subpoenas.

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1           And I should mention that even then I don't believe  
2           that even an issue was raised as to the propriety of the  
3           service of the *subpoena duces tecum*, but, instead, was only  
4           raised as to the propriety of the service of the deposition  
5           subpoenas out of this Court.

6           THE COURT: Mr. Sweeney, let me tell you where we are  
7           on this.

8           It appears to me that the plaintiff and Magento will  
9           be before a person of the black-robed variety sorting through  
10          the scope of a subpoena and the scope of discovery as it  
11          relates to the action before me.

12          We can have a fine old time litigating jurisdiction  
13          under Rule 45, and we probably can make some new law; it would  
14          be great. There isn't a lot of case law under Rule 45; most  
15          judges don't trifle with extended briefing and argument on such  
16          issues, because there are more sensible, practical solutions.

17          But we can do that.

18          And then I can write a nice decision, and then you all  
19          can go up to the Circuit; it will be great. We'll have a fine  
20          old time. Then you'll be on the lecture circuit, Ms. Savage  
21          will be on the lecture circuit with you. It will be terrific.

22          Or we can get to the bottom of what it is that Magento  
23          ought to be required to do in this case or not required to do  
24          in this case. A judge will get to the bottom of that, whether  
25          it is me or a colleague in the Northern District of California.

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1 That will happen. The question is whether you would like to go  
2 through the frall-di-rall of the briefing, we can brief it, and  
3 we'll get to a judicial resolution of the issue. And then you  
4 will either sort the issue out here or in the Northern District  
5 of California.

6 Where do you stand, sir?

7 MR. SWEENEY: I kind of like to be in the Northern  
8 District of California. If you're asking me to consent to  
9 jurisdiction here, I will have to consult that.

10 THE COURT: This is what I think we should do: I  
11 should give you a few minutes to make a phone call, and then  
12 we'll reconvene.

13 MS. SAVAGE: We can discuss issues as and between the  
14 defendant and the plaintiff while Mr. Sweeney makes a phone  
15 call.

16 THE COURT: Or not.

17 MS. SAVAGE: Okay. That's fine, your Honor.

18 MR. SWEENEY: And, your Honor, just so I'm sure  
19 exactly what I'm asking here, there's no issue about the  
20 subpoenas upon individuals, that they were somehow valid by  
21 being served from this district.

22 THE COURT: Not at this stage of the game.

23 MR. SWEENEY: So we're just talking about the subpoena  
24 that was served upon eBay, and whether or not that was good  
25 service.



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1 THE COURT: No, we are not talking about whether it's  
2 good service. We're not talking about whether it's good  
3 service.

4 MR. SWEENEY: We're beyond that.

5 THE COURT: The question is whether we go beyond that  
6 and get the issues, the discovery issues, resolved, and we move  
7 on from here, or we litigate the issue of the propriety and,  
8 more particularly, whether or not the absence of a motion to  
9 quash had any -- had the impact of waiving any defense that you  
10 might otherwise have to the subpoena in that regard. So that's  
11 the issue.

12 We either go the route of briefing all this --  
13 eventually I can safely and confidently tell you that your  
14 client will be before a judge resolving these issues, either me  
15 or another fine judge. We're a little bit like McDonald's here  
16 with the golden arches. We try and provide uniform type  
17 service; it's the same Federal Rules of Civil Procedure; and  
18 hopefully you get the same fine, great service in the other  
19 court.

20 But I'll give you a chance to make that call, and I  
21 would ask you to do so at this point.

22 MR. SWEENEY: I have to run down to the COs and get my  
23 phone.

24 THE COURT: All right.

25 (Pause)

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1 THE COURT: All right. Mr. Sweeney, what say you?

2 MR. SWEENEY: Your Honor, I was not able to get in  
3 touch with someone that could permit me to waive their rights.  
4 So at this point we're going to have to say that we would not  
5 consent. If that changes, we'll advise the Court as soon as  
6 possible.

7 THE COURT: All right.

8 So what I think prudently at this point the plaintiff  
9 is welcome to do is file a formal motion to compel. You'll  
10 have an opportunity to respond to the motion to compel. You'll  
11 have an opportunity to reply, and I will rule on the basis of  
12 the motion to compel.

13 MS. SAVAGE: Thank you, your Honor.

14 THE COURT: If something changes, you'll let  
15 Ms. Savage know and you'll let me know, and we'll see whether  
16 we can hammer this out.

17 MR. SWEENEY: Very good.

18 And that's just with respect to the *subpoena duces*  
19 *tecum* served on eBay, not with respect to the other --

20 THE COURT: That is my understanding, as well.

21 All right. Now, there's a joint request to extend the  
22 discovery period.

23 Ms. Savage, what is your position on that? Fact  
24 discovery extended to July 31, 2013.

25 MS. SAVAGE: I support it.

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1 THE COURT: All right.

2 And the defendants are seeking it, so is that correct?

3 MR. BROWN: Yes, your Honor.

4 THE COURT: All right.

5 Based on what I've read and what I've seen, I think  
6 it's reasonable, so fact discovery will be extended to July  
7 31st.

8 MS. SAVAGE: And will there be a corresponding  
9 extension of expert discovery, your Honor?

10 THE COURT: I'm going to see whether I can work that  
11 out.

12 MS. SAVAGE: Okay. Thank you, your Honor.

13 THE COURT: And I'll extend expert discovery to  
14 September 6. I'll make that September 13th.

15 MS. SAVAGE: Are there any Jewish holidays?

16 THE COURT: There may very well be.

17 MS. SAVAGE: Okay.

18 THE COURT: But, in fact, September 13th may be a  
19 Jewish holiday.

20 MS. SAVAGE: Okay.

21 THE COURT: But nothing need transpire on September  
22 13th. I was going to do it September 6th, but -- is that a  
23 problem?

24 MS. SAVAGE: No, no, that's fine. I know that the  
25 defendants are --

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1 THE COURT: Anybody object to July 31 for fact  
2 discovery and September 13 for expert discovery?

3 MS. SAVAGE: Are you all right?

4 MR. BROWN: No objection.

5 MS. SAVAGE: Thank you, your Honor.

6 MR. BROWN: Your Honor, can I have one question?

7 THE COURT: Yes.

8 MR. BROWN: I just want to clarify that is the  
9 extension on fact discovery for all fact discovery or just the  
10 fact discovery that was set forth in our --

11 THE COURT: I think the only way to do this rationally  
12 is for all fact discovery.

13 MR. BROWN: Thank you.

14 THE COURT: I think doing it otherwise is going to  
15 lead to predictable skirmishes on the subject of what was or  
16 was not within the scope of the letter or what else there is a  
17 need to conduct discovery on. So I'm going to keep it open  
18 till July 31.

19 MR. BROWN: Thank you, Judge.

20 THE COURT: All right.

21 Now, what discovery between plaintiff and defendant do  
22 I need to resolve today?

23 MR. BROWN: Only a couple of things from defendants'  
24 perspective, your Honor. And I'm happy to address also the  
25 plaintiffs' requests, as well, but maybe I'll leave that to

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1 Ms. Savage.

2 From defendants' side, we have two items that remain  
3 outstanding: One is our request for production of AI's  
4 customer complaint information, and we've been asking for this  
5 since February. And specifically, your Honor, this goes  
6 towards Adorama's defense on the defamation claim that's been  
7 brought against Adorama.

8 Specifically, AI is going after Adorama with respect  
9 to a press release in which Adorama called out AI for poor  
10 workmanship, customer service related to the website work  
11 which Adorama states was not performed properly and which left  
12 them with useless source code.

13 THE COURT: All right.

14 Let me hear from the plaintiff on this one.

15 MS. SAVAGE: Our position -- or our issue with this  
16 particular request was we wanted an understanding of what the  
17 word "complaint" meant; because the development of a website is  
18 extremely complex. These aren't like little tiny websites that  
19 are developed by Alexander Interactive. These are very, very  
20 large retail e-commerce websites; they are complicated  
21 websites.

22 So what is a complaint? You know, if a client -- I --

23 THE COURT: Fair question. What's the answer to the  
24 question what's a complaint?

25 MR. BROWN: The answer, your Honor, is we have

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1 narrowed it. And we've asked for complaints regarding -- from  
2 customers regarding the quality of the deliverables that were  
3 submitted, just like we had.

4 And we're willing to further narrow that to also  
5 complaints regarding what's known in the industry as user  
6 acceptance testing, which, in our case, it's Adorama's position  
7 that the plaintiffs rushed the process, and trying to get the  
8 work out the door, because it was too difficult for them to  
9 perform, and they wanted to rush it out to Adorama so that  
10 Adorama could then perform user acceptance testing.

11 The problem was that Adorama was getting material  
12 which had bugs in it and which were not supposed to be there;  
13 so they couldn't perform the user acceptance testing.

14 We suspect that there are other clients out there that  
15 have experienced the same type of quality complaints from the  
16 plaintiffs, and we're entitled -- and we believe we're entitled  
17 to explore that in defense of our defamation claim.

18 THE COURT: All right.

19 So how does the narrowing of the definition bring us  
20 closer to a resolution, Ms. Savage?

21 MS. SAVAGE: Well, first of all, there weren't  
22 allegations in the aixposed.com website and the PR web press  
23 release that discussed bugs or anything of that nature that  
24 came up. So I'm not even sure how that particular issue is  
25 relevant.

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1 THE COURT: Well, in a defamation claim, let's say  
2 that somebody says you do very poor work, okay, and you seek  
3 damages for injury to your reputation.

4 MS. SAVAGE: Right.

5 THE COURT: But another client says you do fabulous  
6 work, but you stole from me. That would tarnish your  
7 reputation and make your reputation worth less, even though it  
8 is not the complaint in the announced or challenged defamatory  
9 statement.

10 MS. SAVAGE: Well, I will tell you this --

11 THE COURT: I really shouldn't have to be in the  
12 situation of doing this, but that would be the -- that would be  
13 the answer to your inquiry.

14 Go ahead.

15 MS. SAVAGE: What I will say is that yesterday we  
16 deposed the owner of Adorama, Inc. And we questioned him  
17 regarding the creation and establishment of this aiexposed.com  
18 website and the publishing of the press release. And the  
19 questions we asked were -- ultimately the AI exposed website  
20 and the press release invited customers of my client to contact  
21 Adorama, to log on to the website, and blog and make comments  
22 about any poor work or any poor experiences with my client.

23 Yesterday, the owner of Adorama testified they got not  
24 a single call that he knew of regarding any of the  
25 information -- you know, from the press release --

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1 THE COURT: Ma'am, ma'am, we're talking about  
2 narrowing a document request. It's terrific that that's what  
3 the testimony was; and presumably, therefore, you may not have  
4 any documents responsive, which ends the matter.

5 The question is with regard to the scope of document  
6 production.

7 MS. SAVAGE: And I'm getting to that.

8 THE COURT: Well, get to it quickly please. I don't  
9 need to hear what the testimony was yesterday.

10 MS. SAVAGE: So in addition to that, we heard that  
11 Adorama also engaged in an online search to see if there was  
12 any negative information out there about AI -- about my client,  
13 and the answer was no.

14 Now, as far as the complaints are concerned, what we  
15 did was we had agreed to produce any documents where conflicts  
16 with any of Alexander interactive's former clients and itself  
17 resulted in a client walking away from a contract, or a  
18 contract being resolved by a settlement agreement or lawsuit or  
19 something of that nature. There were only two such situations,  
20 and we provided copies of those executed settlement agreements.

21 THE COURT: But not adjustments in price.

22 MS. SAVAGE: In fact, the clients paid my client --  
23 the clients paid Alexander Interactive, because they were in  
24 breach.

25 THE COURT: Right.



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1 MS. SAVAGE: And that was the resolution.

2 THE COURT: But you're not willing to produce  
3 documents relating to customers where AI made an adjustment in  
4 price in favor of the customer in response to a customer  
5 complaint.

6 MS. SAVAGE: Oh. So here --

7 THE COURT: I take it. Is that correct?

8 MS. SAVAGE: Well, they would literally have to go  
9 through every single file of every single customer. They are  
10 asking for documents going back to 2008.

11 THE COURT: Well, how many customers have you had  
12 since 2008?

13 MS. SAVAGE: Two thousand or -- I mean it's a lot of  
14 customers. I mean you're talking about going through files and  
15 files and files, electronic and otherwise, to find all these  
16 documents. I mean it's ridiculously burdensome.

17 But putting that even aside, okay, what Mr. Brown  
18 raised was this user acceptance testing, this UAT, and the  
19 issue of customers getting bugs in source code deliverables  
20 from my client.

21 And I just want to explain a little bit about the  
22 process to -- because I think that this is a very misleading  
23 concept that because there are bugs in a deliverable to a  
24 client, and a client recognizes those bugs or finds bugs itself  
25 in its own user acceptance testing, that that somehow

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1 constitutes a complaint.

2 The bottom line is is that when you develop software  
3 or a source code deliverable, you have to go through an immense  
4 amount of testing. My client does quality assurance testing on  
5 its site to find bugs that it can find and attempt to resolve  
6 as many bugs as possible before it then turns over the  
7 deliverable to the client to do its own user acceptance  
8 testing.

9 And in the contract, in particular with Adorama or in  
10 every contract, for the scope of work, the SOW, the acceptance  
11 testing is actually delineated based upon the type of  
12 deliverable. So the user acceptance testing and the acceptance  
13 criteria in Adorama's contract could be totally different than  
14 the user acceptance testing and the testing criteria in all  
15 these other contracts. And finding a bug doesn't constitute a  
16 complaint; that is just the nature of --

17 THE COURT: Well, you're not helping me with defining  
18 the scope of the discovery. Thank you for the education. I am  
19 not surprised that in providing deliverables, there would be  
20 bugs or a punch list. I appreciate that fact.

21 We haven't advanced the ball here any.

22 MS. SAVAGE: What I'm saying though is that my  
23 interpretation of what Mr. Brown just argued to you was that  
24 he's saying if a client sends back a deliverable after user  
25 acceptance testing and says, Hey, I found a bug, fix this, that

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1 that constitutes a complaint. I mean that would literally  
2 include every single project probably that Alexander  
3 Interactive worked on, because it's an iterative process, and  
4 that's just how these things go.

5 So, again, it's so incredibly overbroad and burdensome  
6 and it's an impossible characterization, that I just don't see  
7 how that moves the ball in this case or assists Adorama in its  
8 analysis of Alexander Interaction's reputation or performance.

9 I mean the question is how many sites has Alexander  
10 Interactive launched or not launched on behalf of its clients?  
11 And it's launched them all successfully.

12 THE COURT: Thank you.

13 MS. SAVAGE: Thank you.

14 THE COURT: Do you want to respond?

15 MR. BROWN: Judge, well, a couple things.

16 One, with respect to the attempt to narrow to provide  
17 us with customers where the matters led to complaints or  
18 contracts being walked away from, that leaves -- they've only  
19 produced two documents: They produced unexecuted settlement  
20 agreements --

21 MS. SAVAGE: No, I gave the signed ones to Matt  
22 yesterday.

23 THE COURT: Please. Ms. Savage, when someone else is  
24 speaking, I insist that you refrain. If you want to speak, you  
25 should rise and address the Court.

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1 I would like to note for the record, that there have  
2 been I don't think -- I think a very accurate number is at  
3 least eight occasions in the course of this argument where  
4 while you have been addressing the Court, you have turned your  
5 head away from the Court to lean back to opposing counsel to  
6 seek a confirmation or denial of what you're saying.

7 That's inappropriate.

8 MS. SAVAGE: No, your Honor, I am trying to resolve  
9 issues with counsel by leaning back in order to narrow the  
10 issues that we're putting before your Honor. And I don't  
11 understand why you feel compelled to be so abusive toward me.

12 THE COURT: Ma'am, I'm sorry you feel that way.

13 MS. SAVAGE: I do feel that way, your Honor. I have  
14 been very respectful in this chamber. Very respectful.  
15 Regardless of the tone that you've taken toward me, I have been  
16 extremely respectful, and I have responded to every one of your  
17 comments. And if I have leaned back or spoken to defense  
18 counsel, it's because he's not right next to me, and I am  
19 trying to resolve issues so that we can narrow these matters  
20 before your Honor.

21 THE COURT: Thank you.

22 Please don't interrupt your adversary.

23 MR. BROWN: May I continue, your Honor?

24 THE COURT: Yes.

25 MR. BROWN: Thank you.

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1 With respect to the two settlement agreements that  
2 have been produced, the agreement was we're not really  
3 interested in settlement agreements, Judge, we want to get at  
4 the complaints that gave rise to these settlement agreements to  
5 see if other customers have experienced the same experience  
6 that we've had, Adorama.

7 And there was an agreement that plaintiffs were going  
8 to produce documents relating to the complaints which resulted  
9 in the termination of contracts, settlement of contract  
10 disputes, or clients that walked away. We got two settlement  
11 agreements, and we didn't get the complaints leading up to  
12 that.

13 So we would ask that at a minimum, we get the  
14 complaints that led to these settlement agreements being  
15 executed. We're not really interested in settlement  
16 agreements.

17 The second point, your Honor --

18 THE COURT: Well, let's find out about the first  
19 point.

20 Any objection to that, Ms. Savage?

21 MS. SAVAGE: To what? I'm sorry.

22 THE COURT: All right.

23 If you can repeat that again please.

24 MR. BROWN: Sure.

25 The understanding that we have reached, at least as

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1 part of our lengthy meet-and-confers that took place prior to  
2 today, your Honor, was that at a minimum plaintiffs were going  
3 to produce documents relating to the complaints by Alexander  
4 Interactive clients which resulted in the termination of  
5 contracts, settlements of contract disputes, or a client walked  
6 away.

7 All we've received to date are two settlement  
8 agreements which give no indication of the underlying  
9 complaints. We've been promised the underlying complaints,  
10 which are really the heart of the matter here.

11 THE COURT: Let me see whether I understand you.

12 There are two customers, two different customers; is  
13 that correct?

14 MR. BROWN: Correct, your Honor.

15 THE COURT: And you seek the complaints which led to  
16 the settlement agreements as to those two customers.

17 MR. BROWN: Correct. Which was what was promised us.

18 THE COURT: Any objection in providing that?

19 MS. SAVAGE: The only thing I can say, your Honor, is  
20 I think the fact that the customers ended up paying Alexander  
21 Interactive implicitly demonstrates that Alexander Interactive  
22 wasn't at fault.

23 But, having said that, I will ask my client if he has  
24 any correspondence underlying any of the disputes relating to  
25 the contract, and we will forward it to defense counsel, unless

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1 it's privileged obviously.

2 THE COURT: All right.

3 Does that satisfy that prong of it, sir?

4 MR. BROWN: Yes, it does, your Honor.

5 THE COURT: Okay. Next point.

6 MR. BROWN: Now, the next point is providing us with  
7 just this scope of documents obviously leaves a whole sort of  
8 category of customer complaints where the matter could have  
9 been resolved as you noted, with a price adjustment, or in a  
10 way which didn't involve a settlement or a contract being  
11 terminated. Those are very narrow areas that we've been  
12 provided here.

13 And I recognize that providing every instance in which  
14 a bug was discovered is not practical perhaps; but we are  
15 seeking instances where customers have -- like us, have  
16 experienced serious issues with regard to the quality of the  
17 deliverables that have been performed which prolonged the  
18 engagement and the timeline for delivery.

19 And Alexander Interactive is a very sophisticated  
20 shop, your Honor. There's no way that we can -- that anyone  
21 here should seriously believe that they have hard copy files  
22 that they have to go through. We have more time with  
23 Mr. Schmelkin, who's the CEO, for his deposition, and we have  
24 other time with other defendants. I am convinced that this  
25 information can be called up very quickly.

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1 THE COURT: All right.

2 That is denied without prejudice to your right to ask  
3 questions in deposition, and we'll see what you learn.

4 Next point.

5 MR. BROWN: The other point that we have is we have  
6 asked for production of performance evaluations for the members  
7 of the AI, the Alexander Interactive developers who worked on  
8 the Adorama project.

9 Part of our defense is to show that there was  
10 significant attrition during this project, which involved a  
11 steep learning curve. We had testimony from the head of the  
12 Magento expert consulting out in California, who testified that  
13 they observed a significant attrition of key employees, and  
14 that there's a steep learning curve on this type of project,  
15 and that was one of the factors that contributed to the  
16 failure.

17 Part of our defense is that AI lacked the competence  
18 to complete this project. There's been testimony from some of  
19 the witnesses that there was a formal review process. We want  
20 those performance evaluations; we think they'll support  
21 Adorama's defense here.

22 THE COURT: Performance evaluations as to which  
23 projects?

24 MR. BROWN: As to the Adorama project -- as to the  
25 Adorama project for the AI developers who worked on them, just



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1 those --

2 THE COURT: All right.

3 An internal evaluation of the Adorama project.

4 MR. BROWN: Internal evaluation of anyone on the AI  
5 development team who worked on the Adorama project.

6 THE COURT: You've asked for this; and has this been  
7 met with an objection?

8 MR. BROWN: Well, it was. And then we had a  
9 meet-and-confer on a Sunday before -- on May 6 before we  
10 submitted our May 7th letter, Judge. And we had an agreement.  
11 We had an agreement that these were going to be turned over,  
12 not personnel files, because there are privacy issues. And  
13 then on May 7th, that agreement -- their agreement was reneged,  
14 and there was an objection lodged that this request related to  
15 a second document request which plaintiffs' counsel claimed is  
16 untimely pursuant to the first case management order.

17 It's our position that this document --

18 THE COURT: All right.

19 I don't need to hear that.

20 Ms. Savage, any objection to producing these  
21 performance evaluations?

22 MS. SAVAGE: The only thing that I'm getting from this  
23 is that it sounds like what your Honor is saying is a little  
24 bit different than what Mr. Brown is asking for.

25 It sounds like your Honor is saying, Mr. Brown, are

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1 you looking for performance reviews solely relating to an  
2 employee's performance on the Adorama project, whereas  
3 Mr. Brown is saying he wants just the performance reviews  
4 overall of these employees.

5 THE COURT: These are personnel files and performance  
6 evaluations of individuals who worked on the Adorama project;  
7 is that correct? Is that what your understanding of the  
8 request is?

9 MS. SAVAGE: Well, that's what I thought the request  
10 was, it was over all performance --

11 THE COURT: Is that the request?

12 MR. BROWN: Well --

13 THE COURT: You're looking for the individual  
14 personnel files and personnel evaluations of any person  
15 employed by AI who worked on the Adorama project, is that what  
16 you're seeking?

17 MR. BROWN: Yes.

18 THE COURT: That's denied.

19 Okay. Next point.

20 That's an out-and-out fishing expedition, and that's  
21 denied.

22 Next question.

23 MR. BROWN: From defendants, in terms of defendants'  
24 request, since our application has been granted to extend time,  
25 no other requests on our side.

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1 I'm happy to address plaintiffs' requests, but I'll  
2 defer to plaintiffs' counsel.

3 THE COURT: All right.

4 Let me hear from plaintiffs' counsel.

5 MS. SAVAGE: Okay.

6 So we have resolved -- Adorama has indicated that it  
7 will produce sales revenue -- I'm sorry.

8 Adorama has already produced sales revenue and profit  
9 comparisons; but we discovered during the deposition yesterday  
10 that even Mr. Mendowits, who testified on behalf of Adorama,  
11 was unable to read the report that was produced. He couldn't  
12 even evaluate it or understand it.

13 So Adorama has represented they would get us a  
14 different report that is clearer, more self-explanatory; and so  
15 we await that report. And if we have any problems with that  
16 particular report in interpreting it, your Honor, we'll meet  
17 and confer again and see what we can resolve; and if we can't,  
18 we'll come back.

19 THE COURT: Please try to confine yourself to the  
20 outstanding disputes, not the ones that have been resolved.

21 MS. SAVAGE: Okay.

22 Website analytics. We asked for all the website  
23 analytics on the aiexposed.com website. We only received the  
24 analytics for the month of May 2013. We wanted going back to  
25 the time the site was created, back to September. I don't

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1 recall whether that data is going to be produced or not by the  
2 defendants.

3 MR. BROWN: I'll check with my client and see. If  
4 it's a document that we have readily available, we'll produce  
5 it.

6 MS. SAVAGE: The third item is the defendant Adorama,  
7 Inc. has been the subject of -- and a related entity named  
8 Leisure Pro, which is owned by the same owners. And the two  
9 companies are in the same building, and they share employees  
10 and resources. We have testimony regarding that information.

11 They have been the subject of a number of legal  
12 actions that contain similar allegations to the allegations in  
13 this case, patent infringement -- I mean this is copyright  
14 infringement, but -- allegations of left of licenses of fraud  
15 in connection -- and we believe that there's a pattern of  
16 conduct that has occurred with the way this company operates,  
17 and we believe that information regarding these lawsuits and  
18 any discovery exchanged by the parties is relevant to the point  
19 of impeachment of the witnesses.

20 THE COURT: This is litigation against Adorama; is  
21 that correct?

22 MS. SAVAGE: Yes.

23 THE COURT: All right.

24 That application is denied at this juncture.

25 MS. SAVAGE: Next is we had ask for analytics

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1 regarding the aixposed.com website, information regarding page  
2 views, referring websites, referring searches, engine search  
3 terms, and all reports on web traffic regarding source, region,  
4 technology, and user. We have not received those documents  
5 yet.

6 MR. BROWN: Your Honor, I think we've -- I discussed  
7 this at length with my client, and I think we've produced  
8 everything we have. I'll go back again and ask him a third  
9 time, but I don't think we have anything else to produce on  
10 this.

11 THE COURT: You don't have any objection to the  
12 production; it's that in your -- you're representing to the  
13 Court that you have produced all that there is to be produced.

14 MR. BROWN: That's correct.

15 THE COURT: Okay.

16 MS. SAVAGE: There's also been testimony by the owner  
17 of Adorama that prior to hiring Alexander Interactive to create  
18 this -- let me take a step back.

19 Adorama has and had an existing website called  
20 adorama.com. They came to AI to create a new website on a new  
21 e-commerce platform. That e-commerce platform is Magento.

22 Prior to coming to Alexander Interactive, my client,  
23 the plaintiff in this case, apparently Adorama went to another  
24 entity called Intetics. And it was testified to that Adorama  
25 spent \$3 million with Intetics trying to get a website started,

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1 a new website, rather. And the same allegations were coming  
2 out that Intetics lied to Adorama, and that they made false  
3 promises, and they couldn't do -- it was literally like a  
4 regurgitation of everything that's been alleged in this case  
5 against AI.

6 So we have demanded information regarding the contract  
7 that Adorama had with Intetics and all the underlying  
8 information to see. Again, I mean this is just the nature of  
9 the game with Adorama.

10 THE COURT: All right.

11 Now, is there any defamation claim brought by Adorama  
12 against your client?

13 MS. SAVAGE: No.

14 THE COURT: Let me hear from counsel.

15 MR. BROWN: Thank you, Judge.

16 Two points there.

17 The *Intetics* case that counsel is making reference to  
18 is actually one of the prior lawsuits that plaintiffs are  
19 seeking information on. And that application has been denied.  
20 This is just another way to get at that.

21 Second of all, Intetics involved -- it was a  
22 third-party website designer which performed services for  
23 Adorama years prior to Adorama engaging AI. It has nothing to  
24 do with the Magento e-commerce development that's at issue  
25 here. AI was engaged to develop a completely new website, have

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1 a brand-new website right from the start, not build on the  
2 existing website. This is completely irrelevant and a fishing  
3 expedition.

4 THE COURT: What time period was this?

5 MR. BROWN: I think it was -- I don't know the dates  
6 specifically. I think it was 2007/2008 period, your Honor.

7 THE COURT: Right.

8 And what was the period of the work with AI?

9 MR. BROWN: AI was engaged in 2010 through 2012.

10 MS. SAVAGE: If I may, your Honor.

11 Mr. Mendowits testified yesterday that the work  
12 performed by Intetics took three years or a little longer, and  
13 it went through 2009. And it was after Adorama decided to  
14 abandon Intetics and its work that it then turned to AI or  
15 looking for another entity to do a website.

16 But Intetics was hired -- it might have been on a  
17 different platform than Magento, but Intetics was hired to do  
18 what AI was ultimately hired to do. And I think the experience  
19 that Intetics had with Adorama and the testimony by  
20 Mr. Mendowits yesterday indicates this pattern of being unable  
21 to coordinate decisions within the Adorama company, unwilling  
22 to accept deliverables, this inability to manage these  
23 situations. And I think that really goes to the heart of  
24 whether or not AI did properly perform but just couldn't  
25 coordinate to get this matter complete because of what takes

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1 place in Adorama.

2 And I'm not trying to do a back-door to get into the  
3 *Intetics* case. The *Intetics* litigation had nothing to do with  
4 the contract that Intetics had with Adorama. The *Intetics*  
5 litigation was a nonsolicitation -- or a violation of a  
6 solicitation provision case where after Intetics was fired  
7 basically by Adorama, Adorama took eight of its -- Intetics's  
8 employees, and formed another entity, and then started using  
9 those former Intetics employees to do coding for Adorama's  
10 site.

11 So Intetics sued Adorama for violation of a  
12 nonsolicitation provision in its agreement. So it has nothing  
13 to do with the development of the site itself.

14 THE COURT: All right.

15 At this juncture and on the proffered reason of  
16 relevance, I'm not going to require Adorama to produce  
17 documents relating to any aspect of its relationship with  
18 Intetics.

19 I don't believe that a "pattern of conduct" in this  
20 instance, that there is any preliminary showing that there is  
21 such a pattern that would open the door to such discovery; and  
22 I have my doubts that it would be relevant because of  
23 difference both in time and subject matter of the agreement.  
24 So I am not going to grant discovery there.

25 Ms. Savage, next one.



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1 MS. SAVAGE: The one last thing that I have on my list  
2 is we had served -- timely served interrogatory requests. And  
3 it included 33 interrogatory requests, which is eight requests  
4 above the maximum of 25 under the rules, Federal Rules of Civil  
5 Procedure.

6 We ask leave at this time to be authorized to have the  
7 33 interrogatory requests served and responded to.

8 THE COURT: All right.

9 And how do these interrogatories fit in with -- how do  
10 these interrogatories fit in with the local rule in this  
11 district on interrogatories?

12 MS. SAVAGE: In what sense?

13 THE COURT: Their scope, the matters covered in the  
14 interrogatories.

15 MS. SAVAGE: Well, the matters covered go directly to  
16 either denials of certain issues made in the answers and  
17 seeking explanations, it goes to counterclaims that were made  
18 in the case. So I mean in terms of --

19 THE COURT: Do you have a copy of them with you?  
20 Anybody have a copy?

21 MR. BROWN: I do, Judge.

22 THE COURT: All right.

23 MR. BROWN: Would you like to see them, your Honor?

24 THE COURT: I would, please.

25 MR. BROWN: Permission to approach.

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1 THE COURT: Please.

2 Show them to Ms. Savage; make sure they are an  
3 accurate copy of what these are.

4 Are those the interrogatories?

5 MS. SAVAGE: Yes, your Honor.

6 MR. BROWN: I think there are number 34.

7 MS. SAVAGE: Or 34, yeah.

8 MR. BROWN: There are 34 of them, Judge. Sorry about  
9 the hole punch, Judge.

10 THE COURT: All right.

11 In this district, we have Local Rule 33.3, which  
12 provides -- well, do you want to address the local rule or  
13 shall I -- anything you want to say or --

14 MS. SAVAGE: No, your Honor.

15 THE COURT: Okay. 33.3(a) provides: Unless otherwise  
16 ordered by the Court, at the commencement of discovery -- which  
17 is not where we are now -- interrogatories are restricted to  
18 seeking the names of witnesses with knowledge of information,  
19 computation of categories of damage alleged, and the existence,  
20 custodian, location, and general description of relevant  
21 documents, including pertinent insurance agreements and other  
22 physical evidence or information of a similar nature.

23 Under B, which is where we are, during discovery,  
24 interrogatories other than those seeking the information which  
25 I've just described in (a) above, may only be served, one, if

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1 they are a more practical method of obtaining the information  
2 sought than a request for production or a deposition; or, two,  
3 if ordered by the Court.

4 Finally, at the conclusion of other discovery, and at  
5 least 30 days prior to the discovery cutoff, interrogatories  
6 seeking the claims and contentions of the opposing party may be  
7 served unless the Court has ordered otherwise.

8 Here, it appears to me that the interrogatories are of  
9 a different sort; that discovery would be more practical  
10 through document requests and through depositions. Many of  
11 them are in the form list all Bates stamped numbers of  
12 documents produced and witnesses who will testify in support of  
13 defendants' allegation, and then a paragraph number is  
14 identified. And this seems to be the case for many or most of  
15 the interrogatories.

16 So I will not require the defendants to respond to  
17 them at this stage.

18 Have the defendants served any interrogatories on the  
19 plaintiff?

20 MR. BROWN: No, Judge, we have not.

21 THE COURT: Okay. All right.

22 And I will note for the record that in connection with  
23 the joint pretrial conference process, I will require that the  
24 parties identify all documents which they intend to offer as  
25 exhibits at trial, all witnesses who they anticipate testifying

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1 at trial, all depositions that they seek to introduce at trial.  
2 And it seems to me that in combination with the discovery  
3 devices that are available, this is a more effective and  
4 efficient means to obtain discovery in this case.

5 Anything else, Ms. Savage?

6 MS. SAVAGE: No, your Honor.

7 I just want to advise the Court that the interrogatory  
8 deadline in the order predated the start of depositions and  
9 discovery, so I felt compelled to serve the interrogatories  
10 before that deadline.

11 THE COURT: I understand. All right.

12 MS. SAVAGE: Thank you, your Honor.

13 THE COURT: And what I'm going to do is I'm going to  
14 have the next case management conference for September 5 at  
15 noon, unless that is inconvenient to any of you.

16 Is that inconvenient, Ms. Savage?

17 MS. SAVAGE: Only if it's the first day of school.

18 THE COURT: Let me --

19 MS. SAVAGE: And I don't know what the first day of  
20 school is yet.

21 THE COURT: All right.

22 Well, you'll let me know if it's a problem.

23 MS. SAVAGE: Okay.

24 THE COURT: The 5th is a Thursday.

25 MS. SAVAGE: Okay. Thank you, your Honor.

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1 THE COURT: Mr. Sheppe, does that present any  
2 difficulty to you?

3 MR. BROWN: It's Mr. Brown, your Honor.

4 THE COURT: I'm sorry. Mr. Brown.

5 MR. BROWN: No problem. No problem. We can be here.

6 THE COURT: All right.

7 So then we'll leave it at the 5th. And if it becomes  
8 a problem, we can adjust it accordingly.

9 Ms. Savage, would you prefer it the next week?

10 MS. SAVAGE: No, no, that's fine. I mean I'll just --  
11 I'm sure it's not a problem.

12 Thank you, your Honor.

13 THE COURT: All right.

14 So fact discovery is extended to July 31; expert  
15 discovery is extended to September 13; and the next conference,  
16 as indicated, September 5.

17 MS. SAVAGE: Sorry, your Honor.

18 There was one other thing I forgot to bring up. I'm  
19 not sure it it's an issue anymore.

20 There is a deposition of Steven Lai, L-A-I, and  
21 "Steven" with a "V.," on May 30th. I had asked that it be  
22 moved. My daughter's senior prom is on the 30th, so I have to  
23 be with her to do all her stuff.

24 I'm not sure that Mr. Brown was okay with moving it,  
25 and I just wanted confirmation that that could be done.

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1 THE COURT: Mr. Brown, that can be done, I am sure.

2 MR. BROWN: It can, your Honor, now that all fact  
3 discovery has been extended, and I'll so notify Mr. Lai, who's  
4 a nonparty.

5 Thank you.

6 THE COURT: So that's taken care of.

7 Anything else?

8 MS. SAVAGE: No, that's it.

9 Thank you so much, your Honor.

10 THE COURT: Thank you all very much for coming in.

11 MR. BROWN: Thank you, Judge.

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